Supreme Court, U.S.
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NO. ___ _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

CHERRIE HAYES, SPOUSE OF DAVID HAYES
AND TUTRIX FOR MICHAEL STEWART HAYES
AND EHREN SCOTT HAYES, PETITIONER

V

THE UNITED STATES OF AMERICA
AND DR. BRIAN T. ANTHONY, RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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25pp

QUESTIONS PRESENTED

Whether the District Court erred in dismissing an action against the United States of America for lack of subject matter jurisdiction pursuant to the decision of the United States Supreme Court in *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950).

Whether the *Feres* Doctrine is serving its three underlying purposes in todays society, and if not, should it be overruled.

Whether the survivors of a member of the United States Army may file a claim under the Federal Tort Claims Act (28 U.S.C. §2671, et seq.) for acts of malpractice performed at a military hospital by military personnel during a surgical procedure that was totally elective and was not necessary to return the decedent back to duty or otherwise allow him to perform any of his responsibilities within the military and which was not caused by, aggravated by or in any way related to a military accident or any military service related activity.

LIST OF PARTIES TO THE PROCEEDINGS AND THE COURT BELOW

The caption of the case in this court contains the names of all parties to the proceedings in the United States Court of Appeal, Fifth Circuit.

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1. October 7, 1993, Decision of the U.S. Army Claims service denying appellant's claims on the basis of *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), which is attached hereto and made a part of the Appendix.

2. July 14, 1994, Order of the United States District Court, Western District of Louisiana, Lafayette Division, granting the Motion of Appellees to substitute the United States of America as the sole defendant and dismissing appellant's actionagainst Dr. Anthony and the United States of America on the basis of *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), which is attached hereto and made a part of the Appendix.

3. February 15, 1995, Division of the United States Court of Appeal, Fifth Circuit, affirming the District Court order dismissing appellant's claims, which is reported as *Hayes v. U.S. on behalf of U.S. Dept. of Army*, 44 F.3d 377 (5th Cir. 1995) and attached hereto and made a part of the Appendix.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254 (1) in that it is an appeal of a final judgment of the United States Court of Appeal, Fifth Circuit, which was rendered on February 15, 1995.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES, AND REGULATIONS INVOLVED

1. The Federal Tort Claims Act, 28, U.S.C. § 2671, et seq.

28 U.S.C. § 1346 (b) provides in pertinent part:

> . . . the District Courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury . . . caused by the negligent or wrongful act or omission of any employee . . . while acting within thescope of his office or employment, under circumstances which the United States if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674 provides:

> United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . .

28 U.S.C. § 2679(b)(1) provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment is exclusive of any other civil action proceeding for money or damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

2. Federal Rule of Civil Procedure 12(b)(1) provides, in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third party claim, shall be asserted in responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter * * *.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

Appellant, Cherrie Hayes, on her own behalf and as the provisional tutrix for her minor children, Michael Stewart Hayes and Ehren Scott Hayes, filed a claim for an administrative settlement with the Department of the Army under the Federal Tort Claims Act.[1] Appel-

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[1]See 28 U.S.C. § 2671, et seq.

lant sought damages for the death of David Hayes[2] as a resultof various acts of medical malpractice by Dr. Brian T. Anthony and the personnel of the Bayne-Jones Community Hospital at Fort Polk, Louisiana.[3] The administrative settlement was denied on October 7, 1993 for the reason that David Hayes was an active member of the United States Army at the time of his death and the medical care furnished him at Bayne-Jones Community Hospital was incident to service pursuant to *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950).

On February 14, 1994, this action was filed in the United States District Court for the Western District of Louisiana, Lafayette Division, pursuant to the Federal Tort Claims Act. The original jurisdiction of the District Court was vested by virtue of 28 U.S.C. § 1346(b).

The United States of America filed a motion to be substituted as the sole defendant in this action and dismiss the individually named federal employee as well as a motion to dismiss the action against the United States of America pursuant to the *Feres* Doctrine.[4] The motions were set for oral argument in late July 1994. Prior to the date of the hearing on July 14, 1994, the District Court granted the motion to dismiss.

On October 14, 1994, appellant filed an appeal with the United States Court of Appeal, Fifth Circuit. On February 15, 1995, the United States Court of Appeal, Fifth Circuit, affirmed the District Court's dismissal of appellants action under *Feres*.

II. STATEMENT OF FACTS

The appellant filed a medical malpractice action against the United States of America and Dr. Brian T. Anthony under the Federal Tort Claims Act arising out of the following facts. On July 7, 1993, David Hayes, an officer in the United States Army, was admitted to the

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[2]David Hayes was the spouse of Cherrie Hayes and the father of Michael Stewart Hayes and Ehren Scott Hayes.

[3]Bayne-Jones Community Hospital is owned and operated by the United States of America through the Department of the Army and Dr. Brian T. Anthony is an employee thereof.

[4]See *Feres v. United States*, U.S. 135, 71 S.Ct. 153, 95 L.Ed 152 (1950).

Bayne-Jones Community Hospital at Fort Polk, Louisiana to undergo an **elective** inguinal hernia operation. Bayne-Jones Community Hospital is owned andoperated by the United States of America through the Department of Army. During the course of this simple surgical procedure, Dr. Brian T. Anthony negligently severed David A. Hayes' hepatic vein[5]. David Hayes ultimately died on July 7, 1993 as a result of these negligent acts. The acts of malpractice by Dr. Anthony and hospital personnel include severing the hepatic vein and failing to properly respond to the emergency once the vein was severed.

It is important to note that the inguinal hernia was not a life-threatening medical condition or medical necessity which required surgery to repair it. It was totally elective. It is also important to note that the inguinal hernia which David Hayes had was not the result of, or aggravated by any injury or accident he had received, incurred, or aggravated while in the service or on duty. In other words, the hernia had nothing whatsoever to do with David Hayes' military service. Furthermore, the elective hernia surgery was not necessary to allow David Hayes to return to duty or otherwise qualify for a new position within the Army. The hernia did not prevent David Hayes from performing any of his responsibilities and duties in the military. In no way was David Hayes' hiatal hernia or this surgical procedure related to any aspect of his military service. In essence, the only connection with the military is that the surgery was performed at a military hospital by military personnel.

Although David Hayes was on active duty at the time he was admitted for the surgery, he had prior permission and authority to have this elective surgery. During his time of recovery there was no expectation by Army personnel that he would be able to return to full active service. Despite David Hayes' formal classification as "active duty" at the time of his admission in the hospital, it is evident from his prior authorization and permission to have the surgery that he in reality was not on "active duty." Furthermore, after his admission but before his death he was reclassified as being on Temporary Disability Retirement Leave (TDRL).

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[5]The hepatic vein processes blood outflow from the liver and connects directly to the inferior vena cava.

ARGUMENT AND REASONS FOR GRANTING WRIT

Although Congress chose not to expressly prohibit military personnel from recovering from injures incurred during peace time, the Supreme Court in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), held that military personnel may not recover for injuries received during activities "incident to military service." *Feres*, 340 U.S. at 146, 71 S.Ct. at 159. Three concerns have been identified by the courts as the foundation of the *Feres* Doctrine, as follows: (1) the distinctively federal nature of the relationship between the government and members of the armed forces; (2) the availability of alternative compensation systems; and, (3) fear of damaging the military disciplinary structure. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-72, 97 S.Ct. 2054, 2057-58, 52 L.Ed.2d 665 (1977). Appellants submit that these three concerns are in no way violated by the facts and circumstances surrounding this case and that the dismissal of the instant matter for lack of subject matter jurisdiction pursuant to the decision of the United States Supreme Court in *Feres* was in error.

This Honorable Court needs to revisit the *Feres* Doctrine for two distinct reasons: (1) To determine if *Feres* continues to serve its underlying purposes in the 1990's, and (2) To set forth clear and concise rules to assist the lower courts in achieving uniformity in their application of the *Feres* Doctrine.

ARGUMENT I

FERES NO LONGER SERVES ITS THREE UNDERLYING PURPOSES

To support this judicially created legislation, the Supreme Court has emphasized three policy justifications: (1) the distinctly federal relationship between the United States and its military personnel; (2) the presents of an alternative source of compensation; and (3) the fear of disrupting the military disciplinary structure. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-72, 97 S.Ct. 2054, 2057-58, 52 L.Ed.2d 665 (1977).

A. Distinctively Federal Relationship

The first of these rationales, the distinctively federal relationship, arises from the notion that it makeslittle sense to have the United States liability depend on the "fortuity of where the solider happened to be stationed at the time of the injury." *Stencel*, 431 U.S. at 671, 97 S.Ct. at 2058. However, the merit and vitality of this rationale is currently questionable. Even this court has held that this rationale is "no longer controlling" if not completely "erroneous." *Shearer v. United States*, 473 U.S. 52, 58 n.4, 105 S.Ct. 3039, 3043 n.4, 87 L.Ed.2d 38 (1985); *United States v. Johnson*, 481 U.S. 681, 695, 107 S.Ct. 2063, 2071, 95 L.Ed.2 648 (1987) (Scalia, J., dissenting). This court has undermined its first rationale for the *Feres* Doctrine; therefore, the distinctively federal relationship rationale is no longer served by the *Feres* Doctrine. Additionally, had Congress desired to create a federal workers compensation system, it certainly could have done so leaving such remedy as the exclusive remedy of military personnel.

B. Alternative Source of Compensation

The court in *Feres* premised its second rationale, alternative source of compensation, on the Veterans Benefit Act, which established a statutory scheme for providing pensions to injured military personnel, without regard to negligence on the part of the government, as a substitute for tort liability. *Feres*, 340 U.S. at 144-45, 71 S.Ct. at 158-59. However, this court's own inconsistent treatment of this justification renders it significantly less compelling.[6] *Elliott by and through Elliott v. United States*, 13 F.3d 1555, 1559 (11th Cir. 1994) at 1559; *Hunt v. United States,* 636 F.2d 580, 598 (D.C.Cir. 1980).

Justice Scalia pointed out in his dissent in *Johnson* that "the presents of an alternative compensation system neither explains nor justifies the *Feres* Doctrine," it only makes it more palatable. *Johnson*, 481 U.S. at 698, 107 S.Ct. at 2073 (Scalia, J., dissenting) (citing *Hunt* 636 F.2d at 598). Because of the court's inconsistent treatment

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[6]As the Supreme Court recognized in *Brooks*, the Veterans Benefit Act is neither an exclusive compensation system nor a bar to a serviceman's recovery under the FTCA. *Brooks v. United States*, 337 U.S. 49, 53, 69 S.Ct. 918, 920, 93 L.Ed. 1200 (1949).

of this justification it is no longer controlling. *Shearer*, 473 U.S. at 58 N.4, 105 S.Ct. at 3043 N.4. Based on the treatment detailed above, it is very clear that the court's second rationale, alternativesource of compensation, is no longer a viable justification for the *Feres* Doctrine.

C. Fear of Disrupting the Military Disciplinary Structure

It would seem that the only compelling rationale remaining to support the *Feres* Doctrine is the effect of lawsuits on the military disciplinary structure. When the courts are making the determination as to whether or not an injury occurs "incident to service" they give significant deference to this rationale. However, this third rationale is not grounded in sound reasoning. *Feres* does not bar suits against the government when the injured plaintiff is a civilian. This remains the case even though the tortfeasor is in the military and the military discipline is directly involved. *Sheridan v. United States*, 487 U.S. 392, 401, 108 S.Ct. 2449, 101 L.Ed.2 352 (1988).[7] Accordingly, judicial inquiry into the numerous civilian cases would have the same effect on the military disciplinary concerns. Therefore, it is hard to argue that such routine judicial inquiry must be avoided at all costs simply because plaintiff is in the military. *Taber v. United States*, 45 F.3d 598 (2d Cir. 1995).

Additionally, it is difficult to see how Federal Tort Claims Act damage awards can interfere with the disciplinary relationship between the government and the military tortfeasor since the question is typically not whether the military is permitted to do certain things but rather whether a member of the armed services has behaved negligently or otherwise wrongfully. Although this is the only possible, viable rationale remaining to support the *Feres* Doctrine, there still are certainly numerous indications that it is no longer serving its purpose.

Certainly, if this court is not willing to overrule its decision in *Feres* as suggested by Justice Scalia in his dissent in *Johnson*, this court should revisit *Feres*, if for no other reason, to set forth clear and

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[7]Permitted a civilian shot by a drunken servicemen to sue the United States under the Federal Tort Claims Act for the Navy personnel's negligence in knowingly allowing the drunken serviceman to leave the base with a rifle.

concise rules so that the lower courts can reach equitable results in applying the *Feres* Doctrine.

ARGUMENT II

APPLICATION OF THE FERES DOCTRINE AND ITS INEQUITABLE RESULTS

In *Shearer, supra*, the Supreme Court stated that the courts should take a case by case, rather than a per-se approach to claims for immunity:

> The *Feres* Doctrine cannot be reduced to a few bright line rules; each case must be examined in light of the statute as it has been considered in *Feres* and subsequent cases.

Shearer, 473 U.S. at 57, 105 S.Ct. at 3043 (1985). See also *Stanley v. United States*, 786 F.2d. 1490, 1449 (11th Cir. 1986) and *Bozeman v. United States*, 780 F.2d 198, 201 (2d Cir. 1985); (both cases indicate that *Shearer* requires a case by case analysis of whether baring claims serves the purpose of the *Feres* Doctrine.) Nevertheless, the Fifth Circuit has adopted a per-se rule that if you are a military personnel and you receive your treatment at a military hospital you can never recover under the Federal Tort Claims Act.

The *Feres* case specifically stated that it precluded recovery in cases where the injury was "incident to service." To determine whether a rational relationship exist between the activity leading to the service personnel injury and military service, the courts have focused on three factors: (1) the duty status of the service personnel; (2) the situs of the injury; and (3) the activity the service personnel were engaged in at the time of the injury. *Elliott by and through Elliott v. United States*, 13 F.3d 1555, 1560 11th Cir. 1994. Applying these factors to the facts and circumstances in the case at bar, the lower court should have determined that the death of David Hayes was not incident to his military service.

A. Duty Status:

Although David Hayes was officially on "active duty,"at the time

of admission to Bayne-Jones, in reality, he was not. He had prior authorization and permission from his supervisors to admit himself into the hospital to have the elective inguinal hernia surgical procedure performed. During the course of this surgical procedure and his subsequent recovery, it was not expected that David Hayes would be subject to any military orders and would not have been compelled to perform any duties whatsoever. The Department of Army had no reasonable expectation that David Hayes would return to "active duty" or full military service for several days after the surgical procedure in question. Hence, in reality the facts and circumstances reveal that David Hayes was noton active duty subject to full military caveat. It would seem only appropriate that the court use a reality test rather than a formality test in determining whether someone is on active duty or not.

B. Situs of the Injury:

There is no dispute that this incident took place in a military facility namely, the Bayne-Jones Community Hospital at Fort Polk, Louisiana. However, "where an injury occurred should not be emphasized above all other factors." *Elliott by and through Elliott v. United States*, at 1562. The importance of the location factor to the court's ultimate decision whether the injury arose from an activity "incident to service" has been minimized by subsequent Supreme Court decisions such as *Shearer v. United States*, 473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed. 2d 38 (1985), where it was held that "the cite of the incident is not nearly as important as whether the lawsuit requires a civilian court to second guess a military decision." The fact that this incident occurred at a military hospital alone should not preclude appellant from recovering.

C. Nature of the Activity:

This Honorable Court must consider whether the activity from which the death of David Hayes arose serves some military purpose or mission. The facts and circumstances surrounding this case clearly demonstrate that the activity in which David Hayes was involved which resulted in his subsequent death served no military purpose or mission. The surgical procedure was one which was elective; he was under no orders to have this surgery; and this surgery in no way was

required to return him to active duty to perform any of his duties in the military. Additionally, the surgical procedure was not secondary to any injury or illness that resulted from, was caused by or was otherwise aggravated by any aspect of his military service. In fact, David Hayes death had nothing to do with his army career except in the sense that he was in the military and the surgical procedure was being performed at a military hospital by military personnel.

The circumstances of this case simply "do not involve the sort of close military judgment calls that the *Feres* Doctrine was designed to insulate from judicial review." This case does not involve a situation "wherethe government negligence occurred because of a decision requiring military expertise or judgment." Thus, a court hearing appellants' claim would not have to inquire into "complex, subtle, and professional decisions as to composition, training, equipping, and control of a military force." In fact, the evidence introduced at trial would be entirely medical, as opposed to military procedures.

A few cases have precluded military personnel from recovering under the Federal Tort Claims Act for medical malpractice.[8] In those cases, the military personnel brought suits against the United States for medical malpractice allegedly committed by military personnel at military hospitals. In those cases, the court denied recovery reasoning that the military personnel would not have enjoyed the benefits of that medical treatment but for their status as military personnel. Such cases are clearly in direct conflict in reasoning and logic in light of the recent decision in the 11th Circuit Court of Appeal in *Elliott by and through Elliott v. United States*, 13 F.3d 1555 (11th Cir. 1994). In *Elliott*, military personnel were permitted to recover under the Federal Tort Claims Act for injuries and damages sustained as a result of carbon monoxide poisoning resulting from faulty venting systems in the on-base housing provided by the military to its personnel.

Making a distinction between housing privileges and medical privileges available to military personnel is clearly arbitrary. In both instances, these personnel can receive these services off base or on base. Therefore, there is no rational reason to treat one benefit any

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[8]*Rayner v. United States*, 760 F2d 1217 (11th Cir. 1985); *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987), and *Ricks v. United States*, 842 F2d 300 (11th Cir. 1988)

different from the other. Just as in *Elliott* where the court determined that reviewing the military's housing procedures would in no way interfere with the close military judgment calls that the *Feres* Doctrine was designed to insulate from judicial review. Here, the court's review of the medical practices in question would not involve the sort of close military judgment calls the *Feres* Doctrine was designed to insulate from judicial review.

The surgical care provided to David Hayes for an inguinal hernia was totally elective; was not causedby or aggravated by any military activity or duty; was not necessary to return David Hayes to duty or qualify him for additional duty or responsibilities within the military and, therefore, can hardly be considered distinctly military in character. David Hayes was under the "compulsion of no orders" at the time he elected to have surgery. The surgery was not a medical emergency or necessity. In short, there is simply no connection between David Hayes' medical treatment and the decisional disciplinary interest protected by the *Feres* Doctrine.

All courts have struggled with the application of the *Feres* Doctrine since its inception and that application is still uncertain. Even the Supreme Court is split on the application of the Doctrine. See *U.S. v. Johnson*, 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987).

Notwithstanding this court's instruction in *Shearer* to review all cases on a case by case basis, it would appear that a per-se rule is necessary to provide equitable guidance in this area of the law. This case presents the factual scenario whereby this Honorable Court can adopt a per-se rule that would lead to an equitable distribution of justice in all cases concerning the *Feres* Doctrine and do away with many of the arbitrary distinctions which have resulted from the uncertain application of the *Feres* Doctrine by the lower courts.

CONCLUSION

Appellant submits that *Feres* has outlived its usefulness in todays complex world and that the doctrine no longer serves its underlying rationale. As Justice Scalia stated in his dissent in *Johnson*, "*Feres* is a mistake -- was perhaps always a mistake -- and should be scrapped." If this court is not willing to scrap *Feres* and allow Congress to do its

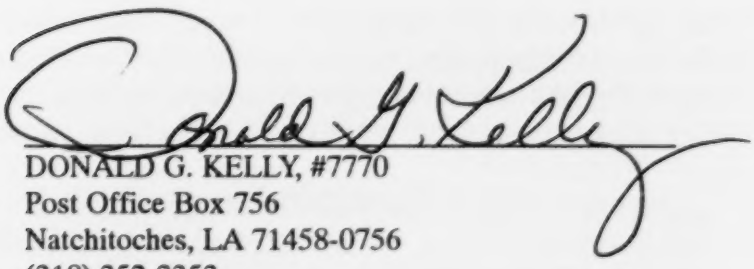
job in creating legislation, then Appellant would urge the court to review the doctrine's application in this case and witness the injustice being done.

Since appellants' claims have nothing to do with the military other than the malpractice was performed at a military hospital and because the appellants' claims are not the type that "would involve the judiciary review of sensitive military affairs at the expense of the military disciplinary effectiveness" it is respectfully submittedthat the rulings of the District Court dismissing the action against the United States of America for lack of subject matter jurisdiction pursuant to the decision of the United States Supreme Court in *Feres* and the United States Court of Appeal, Fifth Circuit's affirmation of that decision in this matter should be reversed and the matter remanded to the District Court for trial on the merits. If *Feres* does, in fact, bar appellants' claims for medical malpractice, then this Honorable Court should adopt a per-se rule that would permit the equitable application of the *Feres* Doctrine and do away with the many arbitrary distinctions that have been grown out of the doctrine's application in the lower courts producing inequitable results.

Accordingly, for the foregoing reasons, the petition respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

KELLY, TOWNSEND & THOMAS



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HAYES v. U.S. ON BEHALF OF U.S. DEPT. OF ARMY

Cherrie HAYES, spouse of David Hayes, and tutrix for Michael Stewart Hayes and Ehren Scott Hayes, Plaintiff-Appellant,

v.

The UNITED STATES of America on Behalf of U.S. DEPARTMENT OF ARMY and Dr. Brian T. Anthony, Defendants-Appellees.

No. 94-40774
Summary Calendar.

United States Court of Appeals, Fifth Circuit.

Feb. 15, 1995.

Serviceman's widow brought action against United States under Federal Tort Claims Act (FTCA) for medical malpractice during course of serviceman's elective hernia operation. The United States District Court for the Western District of Louisiana, Richard T. Haik, Sr., J., dismissed, and widow appealed. The Court of Appeals, Robert M. Parker, Circuit Judge, held that *Feres* doctrine barred malpractice claim even though underlying cause of hernia was not connected to serviceman's military service.

AFFIRMED.

1. Federal Courts 776

Issue of whether district court property applied *Feres* doctrine to preclude claim under Federal Tort Claims Act (FTCA) was question of law subject to de novo review. 28 U.S.C.A. § 1346(b).

2. United States 78(16)

Under *"Feres* doctrine," government is not liable under Federal Tort Claims Act (FTCA) for injuries to serviceman where injuries arise out of or are in course of activity incident to service. 28 U.S.C.A. § 1346(b).

See publication Words and Phrases for other judicial constructions and definitions.

3. United States 78(16)

Feres doctrine barred serviceman's widow's claim against United States for medical malpractice in connection with complications arising during serviceman's elective hernia operation; physician who performed surgery was employed by military and surgery was performed at military hospital; moreover, although underlying cause of hernia was not connected to serviceman's military service, injury complained of was "incident to service." 28 U.S.C.A. § 1346 1346(b).

Appeal from the United States District Court for the Western District of Louisiana.

Before SMITH, EMILLIO M. GARZA and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Cherrie Hayes, the widow of decedent David Hayes, appeals the district court's order dismissing her malpractice claim against the United States government (Government) for lack of subject matter jurisdiction pursuant to *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). We affirm.

FACTS

Hayes instituted a medical malpractice action under the Federal Tort Claims Act, alleging the following facts: Dr. Brian R. Anthony

(Anthony) severed David Hayes's hepatic vein during an elective hernia operation on July 6, 1993. The severing of the vein, along with the Appellees' failure to properly respond after the vein was severed, caused David Hayes's death. David Hayes was an active member of the United States Army at the time of his death. Anthony, a Captain in the Medical Corps, was employed by the Department of the Army as a physician, and at all times relevant to this action was acting within the scope of his employment. Further, the United States, through the Department of the Army, operated Bayne-Jones Community Hospital at Fort Polk, Louisiana where the surgery was performed.

THE *FERES* DOCTRINE

[1] The issue os whether the district court properly applied *Feres v. United States*, 340 U.S. 135, 71 A.Ct. 153, 95 L.Ed. 152 (1950) to preclude Hayes's claim is a question of law which we review *de novo*. *Adams v. United States*, 728 F.2d 736, 738, n.3 (5th Cir.1984).

[2] The Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), permits the United States to be sued in federal district courts for the negligent or wrongful acts of its employees. The FTCA is a limited waiver of the sovereign immunity of the United States and has been strictly construed in favor of the United States. *Vernell v. United States Postal Service*, 819 F.2d 108, 111 (5th Cir.1987). The Supreme Court has articulated an exception to the FTCA waiver of immunity, referred to in subsequent jurisprudence as the "*Feres* doctrine," holding that the Government is not liable under the FTCA for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. *Feres*, 340 U.S. at 146, 71 S.Ct. at 159.

This Court has held that the *Feres* doctrine precludes a suit brought under the FTCA against the Government for damages sustained by a service man on active duty during elective surgery performed by military doctors. *Lowe v. United States*, 440 F.2d 452 (5th Cir.1971); *see also Coyne v. United States*, 411 F.2d 987, 988 (5th Cir. 1969).

[3] In 1985 the Supreme Court reaffirmed the *Feres* doctrine, but instructed courts to take a case-by-case, rather than *per se* approach to claims for immunity:

> The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases.

United States v. Shearer, 473 U.S. 52, 57, 105 S.Ct. 3039, 3043, 87 L.Ed.2d 38 (1985). Appellant emphasizes that David Hayes's hernia was not caused or aggravated by any military activity or duty, and that surgery was elective and was not necessary in order for him to perform any of his responsibilities within the military. She contends that the concerns that provided the under-pinnings of *Feres* (the distinctively federal nature of the relationship between the Government and members of the armed forces, the availability of alternative compensation systems, and the fear of damaging the military disciplinary structure, *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-72, 97 S.Ct. 2054, 2057-58, 52 L.Ed.2d 665 (1977) do not justify applying the doctrine to this case. Further, the Supreme Court has narrowed the reasons for applying the *Feres* doctrine to concerns respected the management of the military; that is, concerns that call into question basic choices about the discipline, supervision, and control of a serviceman. *United States v. Shearer*, 473 U.S. 52, 58, 105 S.Ct. 3039, 2043, 87 L.Ed.2d 38 (1985).

However, irrespective of the evolving rationale, the Supreme Court has made it clear that the Government remains immune from suits by servicemen where the injuries arise out of or are suffered in the course of activity incident to service. *United States v. Johnson*, 481 U.S. 681, 692, 107 S.Ct. 2063, 2069-70, 95 L.Ed.2d 648 (1987). Medical malpractice by a physician employed by the military, in a military hospital, and in the course of treatment of a person in active military service has been clearly held to fall within "the course of activity incident to service." *Shults v. United States*, 421 F.2d 170, 171-72 (5th Cir.1969). The fact that the underlying cause of the hernia was not connected to David Hayes's military service is not instructive. The injury complained of, the severed vein, was "incident to service" and therefore not actionable under FTCA.

We therefore AFFIRM the district court's dismissal of Appellant's action.

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MAY 1994
ROBERT H. SHEMWELL, CLERK
U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE & OPELOUSAS, LOUISIANA

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
JUL 14 1994
ROBERT H. SHEMWELL, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CHERRIE [illegible] of DAVID HAYES, and Tutrix for MICHAEL STEWART HAYES and EHREN SCOTT HAYES,
Plaintiff

VERSUS

UNITED STATES OF AMERICA, ET AL.,
Defendants

CIVIL ACTION NO. 94-0285

JUDGE HAIK
MAGISTRATE JUDGE METHVIN

ORDER

The Court having before it the motion of the United States of America to substitute itself as the sole defendant in the above-captioned action, and further to dismiss this action for lack of subject matter jurisdiction;

IT IS ORDERED that the motion be and is HEREBY GRANTED:

1) substituting the United States of America as the sole defendant in the above-captioned action;

2) dismissing the claims against Dr. Briar Anthony with prejudice; and

3) dismissing this action against the United States of America for lack of subject matter jurisdiction pursuant to the decision of the United States Supreme Court in Feres v. United States of America, 340 U.S. 135 (1950).

THUS DONE AND SIGNED this 13th day of July, 1994, at Lafayette, Louisiana.

R. T. Haik
UNITED STATES DISTRICT JUDGE

JUDGEMENT ENTERED July 15, 1994
BY Donna M. Norfleet
COPY TO Kelly
Denny

BEST AVAILABLE COPY

DEPARTMENT OF THE ARMY
U. S. ARMY CLAIMS SERVICE
OFFICE OF THE JUDGE ADVOCATE GENERAL
FORT GEORGE G. MEADE, MARYLAND 20755-5360

OCT 0 7 1993

REPLY TO ATTENTION OF:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Tort Claims Division

SUBJECT: Claims of Cherrie N. Hayes, Michael S. Hayes and Ehren S. Hayes, for the Wrongful Death of David A. Hayes, 93-C01-T243/T244/T245

Mr. Jeffrey H. Thomas
Kelly, Townsend & Thomas
Attorneys at Law
137 Saint Denis Street
P.O. Box 756
Natchitoches, Louisiana 71458-0756

Dear Mr. Thomas:

This notice constitutes final administrative action on the subject claims against the United States in the amounts of $2,000,000 for Cherrie N. Hayes and $1,000,000 each for Michael S. and Ehren S. Hayes, for the wrongful death of David A. Hayes, allegedly due to improperly performed surgery at Bayne-Jones Army Community Hospital, Fort Polk, Louisiana, on July 7, 1993.

The claims are denied. David A. Hayes, was an active duty member of the United States Army at the time of his death. Medical care furnished to him was incident to Service. A claim which arises incident to Service is excluded from consideration under the Federal Tort Claims Act. Feres v. United States, 340 U.S. 135 (1950).

Because of the above cited bar to suit, this Service has not conducted any claims investigation into the merits of the claim. Therefore no conclusion is expressed as to whether the claim is otherwise payable. However, the claim has been referred to Army medical authorities in order to ensure that a quality assurance review has been or will be conducted in accordance with existing directives and procedures.

I am required by regulation to inform you that if your clients are dissatisfied with the action taken on their claims, they may file suit in an appropriate United States District Court no later than six months from the date of mailing of this letter, or their remedy will be forever barred. This is not intended to imply that any such suit, if filed, would be successful.

Sincerely,

William C. Kirk

William C. Kirk
Lieutenant Colonel, U.S. Army
Chief, Tort Claims Division

C-3

DEPARTMENT OF THE ARMY

COMMANDER
U.S. ARMY CLAIMS SERVICE, OTJAG
BUILDING 4411
ATTENTION: JACS- TCD
FORT GEORGE G. MEADE, MD 20755-5360

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Mt. Jeffrey M. Thomas
Kelly, Townsend & Thomas
Attorneys at Law
137 Saint Denis Street
P.O. Box 756
Natchitoches, Louisiana 71458-0756

10-15-93